SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1275

NATURAL GAS PIPELINE COMPANY OF AMERICA,
Petitioner

v.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, *et al.*,
Respondents

REPLY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Respondent, Associated Gas Distributors (AGD) opposes the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

QUESTION PRESENTED

Whether the Court of Appeals properly concluded that the Federal Power Commission may not ignore judicially sanctioned statutory tests in determining whether abandonment of previously certificated service to an interstate pipeline is required by the present or future public convenience and necessity.

STATEMENT

AGD respectfully suggests that the recitation of the background of this case by Petitioner Natural Gas Pipeline Company of America (Natural) fails to identify the specific findings of fact made by the Presiding Judge on the basis of the record evidence adduced in the October 1971 hearing (R. 1-1277). These findings are significant since they were not disturbed by the Commission's order.

After receiving the full evidentiary presentation by all parties, the Presiding Judge issued an Initial Decision which denied both the applications to abandon service to Transcontinental Gas Pipeline Corporation (Transco) pursuant to Section 7(b) of the Natural Gas Act and the contingent applications to initiate additional service to Natural. In reaching this result, the Presiding Judge resolved three fundamental questions. First, the Presiding Judge was confronted with the argument that abandonment of these sales to Transco was mandated by the terms of a 1958 settlement agreement between Natural and the producers from the LaGloria Field. As a corollary, it was claimed that denial of the producers' abandonment applications was in violation of that settlement agreement and with the Commission's order accepting it. The Presiding Judge held that the terms of that settlement agreement and the Commission's order in no way prejudged the outcome of the Commission's deliberations under Section 7(b) to determine whether the present or future public convenience or necessity would be served by the proposed abandonment. (J.A. 92).

He then turned to the question of appropriate tests to be used in determining whether abandonment was warranted in this particular case. His conclusion was that the proper statutory standard, as fully explained in the *Michigan Consolidated* case,[1] was that of the comparative needs of the public served by the two interstate pipelines, the real

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[1] *Michigan Consolidated Gas Company* v. *FPC*, 283 F.2d 204 (1960), *cert denied sub nom*, 364 U.S. 913 (1960).

parties and interests whose supplies were to be affected by the abandonment (J.A. 86). Finally, the Presiding Judge reviewed various factors related to each pipeline's present and foreseeable gas supply circumstances in order to determine the respective customers' needs. On the basis of this comparative evaluation of the evidence he concluded that:

> "Transco and its customers have a continuing need for the 81,000 Mcf/d of LaGloria gas not [sic] being sold them by the producers; that Transco's curtailment and possible effect on existing customers is more substantial than the effect of a decrease in purchases of primarily valley gas by Natural's customers; that Natural has failed to show that the adverse effect on it and its customers as compared to Transco and its customers permit abandonment by the producers of this sale to Transco . . ." (J.A. 101).

Contrary to Natural's assertion, the Presiding Judge did not conclude that the "relative needs were quite evenly balanced," but rather that, based on the record evidence, Transco and its customers had a greater need for the gas.

On March 21, 1973, the Commission reversed the Presiding Judge's decision holding that the 1958 settlement agreement was controlling on the question of whether the deliveries to Transco should be abandoned (J.A. 117). The Commission applied only a "sanctity of contract" analysis holding that the producers' contracts should be enforced in the absence of a showing of "unequivocal public necessity" (J.A. 118-119). The Commission's decision was completely devoid of any consideration of the need of Transco and its customers for the gas.

THE OPINION BELOW

The Court below determined that the Commission erred in focusing exclusively upon the contractual rights to the LaGloria Field gas supply. The Court concluded that reliance upon this single facet of the proceeding "seems to have so mesmerized the Commission that it abdicated its

statutory responsibility to guarantee that the overall public interest 'will in no way be disserved' by abandonment". Reliance upon Natural's contractual rights was an appropriate consideration for the Commission in reaching its determination; however, the statutory test for abandonment is much broader and many more factors must be taken into consideration. Thus, in its *per curiam* order, the Court remanded the proceeding so that the *Commission* could exercise its expertise and make findings based on record evidence on all considerations relevant to the proposed abandonment of service to Transco.

REASONS FOR DENYING THE WRIT

Natural has failed to state any justification for the issuance of a writ of certiorari in this proceeding. The circumstances under which a writ is available are limited. Even accepting Natural's rhetoric at face value, this case does not raise either a substantial federal question or a conflict of decisions between courts of appeal. Simply stated, there is no basis for Supreme Court review. The Court below determined that the critical question was the appropriate statutory standards to be used in determining whether the abandonment of service to an interstate pipeline is required by the present or future public convenience and necessity. The Court agreed with the Commission that contractual rights of the parties must be given consideration in resolving that question. However, the Court concluded that the Commission had ignored the abandonment criteria set forth in the *Michigan Consolidated* case (*supra*); in order to permit the Commission to apply those criteria to the particular facts of this case, the Court remanded the proceeding to the Commission for further hearings.

Natural correctly observes that "there is nothing in the public convenience and necessity provision of Section 7(b) of the Act requiring the Commission to give 'primary importance' to any one specific factor". In fact, just the opposite is true. Section 7(b) determinations require broad

considerations of the public interest and particularly the needs of the interstate pipeline whose service is to be abandoned. The Commission in fact focused only upon one specific factor to the exclusion of all others. Viewed in this perspective, the Court's decision is entirely consonant with *FCC* v. *Allentown Broadcasting Co.*, 349 U.S. 358 (1955).

A. THE COURT OF APPEALS CORRECTLY REQUIRED THE FPC TO APPLY JUDICIALLY SANCTIONED STATUTORY TESTS FOR ABANDONMENT OF SERVICE.

The FPC refused to consider this proceeding as an application to abandon service to an interstate pipeline; rather, the Commission relied exclusively upon the initiation of service from the LaGloria Field to Natural. The Court below correctly recognized that the service to Natural *cannot* be initiated unless an abandonment of service pursuant to Section 7(b) of the Natural Gas Act is first permitted. The threshold consideration to the Court, therefore, was the abandonment issue.

There can be no question that the Natural Gas Act imposes stringent standards in determining whether the abandonment of service is permitted by the present or future public convenience and necessity. The mere expiration of a contract's term does not justify an abandonment nor does it terminate the FPC's jurisdiction over the sale.[2] The fundamental purpose of the statutory abandonment provision is clearly to protect the consumer's right to a continuing source of gas supply.[3]

The court below observed that fundamental standards in determining whether abandonment is appropriate in the public interest must be considered by the Commission.

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[2] *Sunray Mid-Continent Oil Company* v. *FPC*, 364 U.S. 137 (1960).

[3] *Michigan Consolidated Gas Co.* v. *FPC*, *supra*, 283 F.2d at 214.

They recognized the two important principles set forth in the *Michigan Consolidated* case as:

> "(1) A pipeline which has obtained a certificate of public convenience and necessity to serve a particular market has an 'obligation, deeply imbedded in the law, to continue service,' and (2) the burden of proof is on the applicant for abandonment to show that the 'public convenience and necessity' permits abandonment, that is, that the public interest 'will in no way be disserved' by abandonment." (Slip op., p. 8)

The Commission's order failed to acknowledge, much less apply, those statutory criteria in determining whether abandonment was appropriate. The Court concluded that this myopic view was at odds with the provisions of the Natural Gas Act.

Natural's petition herein relies upon several cases which purport to suggest that the allocation of gas supplies is strictly a function vested in the Commission.[4] Unfortunately those cases involve the *commencement* of service pursuant to Section 7(c) of the Act and not the *abandonment* of service pursuant to Section 7(b) of the Act. Obviously different considerations pertain to the intiation of service than to the disruption of already certificated service. Consequently, reliance upon those Section 7(c) cases to support the thesis that the Court below improperly acted in an area reserved for Commission function is wholly inappropriate. The Court determined that the Section 7(b) abandonment criteria could not be ignored by the Commission; the Court did *not* substitute its conclusion for the Commission's expertise in Section 7(c) gas allocation proceedings.[5]

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[4] *Michigan Consolidated Gas Company* v. *FPC*, *203* F.2d 895 (3rd Cir, 1953); *FPC* v. *Transcontinental Gas Pipeline Corp.*, 365 U.S. 1 (1961).

[5] Natural's contention that the Court's decision will impede the Commission's exercise of its duties is equally erroneous. The Court simply stated that certain minimum tests must be applied to applications under Section 7(b).

Finally, the cornerstone of Natural's petition herein is that "the Commission-approved settlement agreement should be honored by [the Commission] absent circumstances of 'unequivocal public necessity' ". Such a contention was specifically rejected by the Court below. First, the Court concluded that the specific language of the Commission order approving the 1958 settlement *required* the filing of an abandonment application prior to switching deliveries to Natural.[6] In other words, the order was not dispositive of later-filed abandonment applications.

Second, the Court concluded that the burden of showing that abandonment should be granted is on the applicant, not on the receiving pipeline. Finally, the Court discussed the concept of "unequivocal public necessity" as discussed in this Court's *Permian* decision, noting that this Court was not in that case speaking in the context of statutory standards for abandonment. Going further, the Court below stated that "the public interest is jeopardized and 'unequivocal public necessity' is demonstrated whenever private contracts substantially impair the ability of a pipeline to maintain adequate levels of service to its customers." (Slip op., p. 10, fn 11). Thus, the Court considered and rejected each aspect of Natural's argument that Transco and its customers have the burden of proving that abandonment should not be granted. There is no conflict between this Court and the decision below.

B. THE ONLY FINDINGS OF FACT IN THE ENTIRE PROCEEDING DETERMINED THAT TRANSCO HAS A GREATER NEED FOR THE LA-GLORIA FIELD GAS.

The threshold precept upon which Natural's entire petition is predicated is that "substantial evidence showed the comparative need [of Natural and Transco] to be approximately equal". Such a statement is strange indeed in

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[6]Slip op., p. 9; *Argo Oil Corporation*, 20 FPC 208, 210 (1958).

light of the findings of fact made by the Presiding Judge and the failure of the Commission to disturb those findings. The fact is that the record evidence in this proceeding clearly shows that the comparative needs of the pipelines were *not* equal and that Transco and its customers had a greater need for the gas supply from the LaGloria Field. The Court below determined that the Commission must consider the comparative needs of the pipelines in reaching its decision. The Court did not preclude the Commission from giving due consideration to the contractual rights of the parties, nor did it preclude the Commission from giving due consideration to the more diligent pipeline; however, complete exclusion of the comparative needs considerations by the Commission is directly counter to the statutory standards established in the Natural Gas Act and judicial precedent.

The Presiding Judge made a careful study of the facts relating to the needs of each pipeline. He studied the existing reserves and reserve life indices, the present and proposed curtailments, the reordering of priorities and end use, and the impact upon the consumers on each pipeline system. Having done so, the Presiding Judge concluded that "Natural has failed to prove that the present or future public convenience or necessity permit abandonment" (J.A. 96). In fact, the Presiding Judge concluded that Natural's supply deficiency was inflated and did not reflect actual curtailments in previously rendered levels of service. Natural's "shortage" is its inability to meet its customers' request for *higher* load factor service in the warmer months. The gas would allow incremental service to Natural's customers whereas Transco's customers are "experiencing an actual curtailment of gas" below prior levels of delivery (J.A. 96). These are findings of fact which the Commission failed to disturb or modify in its order.

Natural itself agreed in brief before the Court below that the Commission did not reach the question of the comparative needs of the two pipelines. According to Natural, the Commission did not reach the issue of "*which pipeline, in fact, had greater need*" for the LaGloria Field

gas (Initial Brief, p. 11, 14, 37, 38). In fact, Northern Illinois Gas Company, the largest distribution company-purchaser from Natural frankly stated in its brief to the Court below that "... *the Commission did not differ with the Administrative Law Judge on his findings of fact*" and that "to overrule the Commission on its finding of fact would be erroneous and futile, since *it made no independent findings of fact*". (Court of Appeals Brief, p. 12, emphasis supplied). Natural's rhetoric at this point seems to adopt a different note. Perhaps in light of Natural's and its customers' position in brief, the Court below was not convinced that the Commission even considered the comparative needs of the pipelines in reaching its decision.

Without a relatively equal need, Natural has no basis for arguing that FPC reliance solely on contracts and settlements should prevail "all other things being equal." The comparative needs of the pipelines were *not* equal and the FPC order did not find that they were. In the *Allentown* case *supra*, cited by Natural, the Federal Communications Commission (FCC) *made findings* concerning the need for radio service of two respective communities. The FCC found that one community had a greater need for the station. The Court of Appeals reversed, concluding that there was no substantial evidence to support the conclusion that the ability of the applicants to serve their respective communities was equal. This Court reversed, *holding that the respective needs of the two communities was an appropriate consideration.*

In the case at bar, the Court below determined that certain statutory tests for abandonment of service had been ignored by the FPC and that *the comparative needs of the areas served by the two pipelines should have been considered.* The FPC did not disturb the Presiding Judge's finding that Transco had a greater need for the gas even though it gave no weight to such finding. The Court below did not invade the FPC's discretionary province but merely directed that the comparative need factor be considered. In short, the decision below is fully consistent with this Court's *Allentown* decision.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Natural's petition for a writ of certiorari be denied.

Respectfully submitted,

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